If he is represented by an advocate, the signed copy is served upon him by leaving it or posting it by registered post at his address mentioned in the notice of appeal (subsection (iii)).

The petition of appeal is then prepared as required by subsection (iv) of section 307 of the Code, which requires "the appellant" to lodge with the clerk of the Magistrate's Court the petition of appeal. In those cases above-mentioned the learned judges held that the appellant himself must sign the petition of appeal.

In coming to their decisions the learned judges were right in construing the words "the appellant" in the setting of the subsection, that is that the same word in the same section of a statute must be given the same meaning. But in our opinion this principle of construction is only one element in deciding the true intention of the section and it must not be carried too far lest we fail to see the wood for the trees. If the context excludes the application of this principle then it would be futile to apply it. Words take their colour from their context. Section 307(i) of the Code which relates to the procedure for appeal provides for a dissatisfied party to prefer an appeal to the High Court by lodging a notice of appeal and subsection (iv) stipulates the time for the appellant to lodge with the subordinate court a petition of appeal. Neither provision signifies the signatory to the notice or petition and does not provide for the appellant to do so 'personally' or 'in person' as some legislative enactments specifically prescribe. This therefore attracts the maxim *qui facit per alium facit per se* (he who does an act through another is deemed in law to do it himself). We are reinforced in our conclusion by the provisions of section 307 (vii) of the Code which enact that where the appellant is in prison he shall be deemed to have complied with the requirements of the section if he gives to the officer in charge of the prison either orally or in writing notice of appeal and the particulars required to be included in the petition of appeal within the prescribed time and on payment of the prescribed fee whereupon such officer shall forthwith forward the notice or petition or the purport thereof together with the appeal fee to the subordinate court. It is abundantly clear that in such a case the prison officer would be acting on behalf of the appellant in complying with the necessary statutory requirements for an appeal without the necessity for the appellant to sign the documents in question, and in the circumstances there is all the more reason to negate any justification for a constricted view in relation to an appellant fortunate enough not to be so confined.

We answer the question accordingly in the affirmative. The appeal is reinstated for hearing.

Order accordingly.

Solicitors: *R.R. Chelliah Bros.*

LAW HAP LIEN v. HENRY LO SIAK JIN & ANOR.

[O.C.J. (Chong Siew Fai J.) September 13, 1980]

[Kuching – Originating Motion No. K. 2 of 1980]

Land Law – Application for removal of caveat – Whether caveat should remain – Whether beneficiary has caveatable interest in land –

Chinese Customary Law – Administration of Estates Ordinance, S. 29.

This was an application for an order that a caveat entered by the applicant against 3 parcels of land forming part of the estate of his deceased father do remain in force until further order of the court or until after determination of certain questions relating to the winding up of the estate of the deceased under section 29 of the Administration of Estates Ordinance. The applicant disputed the entitlement of certain beneficiaries in the estate. On behalf of the applicant it was submitted that as he was a beneficiary of the estate whose beneficiaries had been ascertained, he had a caveatable interest in the 3 parcels of land. Accordingly, the *status quo* in the matter should be preserved pending the determination of certain questions relating to the winding up of the estate.

The respondents, on the other hand, contended that the applicant had no caveatable interest because the administration of the estate was still not completed in that there was still to be decided the question of the entitlement of the unmarried daughters of the deceased that is to say whether they were entitled to life interests in the deceased's estate and who should maintain them.

Held, allowing the application: there was no evidence to indicate that the deceased's estate had any outstanding debts or liabilities nor was there any evidence to show that the unmarried daughter of the deceased were entitled to life interests in the deceased's estate. Authorities tend to show that they are only entitled to be maintained by their brothers who inherit their father's estate. Since the residue of the estate has been ascertained, the question as to the number of the residuary beneficiaries only affects the value of their individual shares and does not affect the size or ascertainment of the residue of the estate. Accordingly, as the residue of the deceased estate had been ascertained, the applicant had a caveatable interest.

Cases referred to:

(1) *Eng Mee Yong & Ors.* v. *Letchumanan* [1979] 2 M.L.J. 212.
(2) *Lee Ah Thaw & Anor.* v. *Lee Chun Tek* [1978] 1 M.L.J. 173.
(3) *Tan Thean Choo* v. *Cheah Kah Seong* [1977] 2 M.L.J. 106.
(4) *Re Savage's Caveat* [1956] N.Z.L.R. 118.
(5) *Phiong Khon* v. *Chonh Chai Fah* [1970] 2 M.L.J. 114.

CIVIL SUIT.

J.C. Fong for the applicant.
K.L.W. Chang for the respondent.

Cur. Adv. Vult.

Chong Siew Fai J.: By Originating Motion dated April 1, 1980 the applicant applied for an order that the Caveat registered as Instrument No. L11565/1979 at the Kuching Land Registry office on November 13, 1979 lodged by him against 3 parcels of land forming part of the estate of his deceased father (hereinafter referred to as "the deceased") do remain in force until further order of the court or until after determination by the court of certain questions relating to the winding up of the estate of the deceased under section 29 of Administration of Estates Ordinance. The 2 respondents are the administrators of the deceased's estate and are also respectively a son and a grandson of the deceased. The motion is supported by an affidavit made by the applicant against which there is no affidavit in opposition or counter affidavit from the respondents.

The facts which are not disputed and so far as are relevant may be summarised as follows: The deceased died intestate on December 22, 1960 and the Letters of Administration of the deceased's estate were granted to the respondents pursuant to court order made in Originating Summons No. K. 28 of 1977. At the time of his death the deceased owned 5 pieces of land all of which form the properties in his estate in this case, and the said caveat lodged by the applicant is against 3 of the said 5 pieces of land. There is no evidence that the estate has any other assets, real or personal, apart from the 5 peices of land. The deceased left behind his wife, 3 sons (of whom the 1st-named respondent is one) and 4 daughters. One of these 3 sons died in 1970, survived by his wife, a son (2nd respondent) and a daughter. Besides the 3 sons, the deceased had another son named Arthur Law who pre-deceased him but is survived by 2 sons, Law Ah Tian and Law Ah Min, whose entitlement to a share in the deceased's estate is disputed by the applicant. The widow of the deceased died on or about August 22, 1975. Of the 4 daughters of the deceased, one is married and resides in Singapore whilst the other 3 are still unmarried. The respondents also seek to know whether the 3 unmarried daughters are entitled to any life interests in the deceased's estate, and if they are not so entitled, then whether they are entitled to be maintained and who (whether the estate or some others) should maintain them.

It is not disputed that the laws to be applied as to who are beneficially entitled to and in what proportion of the deceased's estate are the Chinese Customary Laws applicable to the Hakka Community. It is also not disputed that the applicant being the natural son of the deceased is beneficially entitled to a distributive share of the deceased's estate. In this connection the applicant also expressed the wish that his share of the lands be given to him as such and not in the form of sale proceeds. On the other hand it appears that the respondents had arranged for the sale of 4 parcels of the said lands which 4 parcels include the 3 parcels affected by the said caveat Instrument No. L11565/1979 lodged by the applicant.

It is also an agreed fact that the respondents had on May 23, 1980 applied to court by Originating Summons seeking the following relief, namely:

(i) an enquiry and declaration as to who are the beneficiaries and the nature and extent of the interests of these beneficiaries in the estate;
(ii) a declaration that the Administrators are entitled to wind up the said estate by selling the landed properties of the estate and to distribute the proceeds of sale amongst the beneficiaries;
(iii) further or other reliefs as the court may think fit to wind up the estate.

The respondents do not dispute that the sons of the deceased are beneficiaries of the deceased's estate but would at the hearing of the above Originating Summons seek decision of court as to whether the unmarried daughters are entitled to life interests in the estate.

On behalf of the applicant, it is submitted that since no evidence is adduced by the res-

pondents to show that there are any debts or liabilities of the estate outstanding, it may reasonably be concluded that the estate has no outstanding debts or liabilities and the 5 parcels of land must therefore be treated as the residue of the estate and be available for distribution. It is therefore submitted that since the residue of the estate has been ascertained, the applicant has a caveatable interest in the said 3 parcels of land. It is also contended that even in the unlikelihood of any debts owed by the estate still outstanding and unpaid, there are still 2 remaining parcels of land that may be sold to pay off the debts since the applicant has lodged caveat against only 3 of the 5 parcels of land. It is hence submitted that on the authority of *Eng Mee Yong* v. *Letchumanan*[1], the applicant has established that there is a serious question to be tried and that the balance of convenience is in favour of the applicant and that the status quo of the matter should be preserved.

Counsel for the respondents contends that the first issue to decide is whether the applicant has a caveatable interest to lodge the caveat; if he has not, the caveat must be removed, and the principles laid down in *Eng Mee Yong & Ors, supra,* i.e. whether there is a serious question to be tried and the question of balance of convenience, need not be considered. He argues that the applicant as a beneficiary has no caveatable interest in the 3 parcels of land on the grounds that by virtue of section 20 of the Administration of Estates Ordinance the respondents are trustees of the estate with absolute discretion to sell all or any part of the estate and that the applicant is only entitled to the residue of the estate, and that his interest is not in the land but in the residue, if any. It is also submitted that the administration is not complete in that there are still to be decided the question of the entitlement of the unmarried daughters of the deceased that is to say whether they are entitled to life interests in the deceased's estate, and who should maintain them i.e. the deceased's sons or the estate. Counsel for the respondents therefore contends that the applicant's share in the estate is still undefined and too remote to create or sustain a caveatable interest.

I consider it appropriate to say a few words on the contention that the respondents have the absolute discretion to sell all or any part of the estate. I think that statement should be qualified. Under section 20 of the Administration of Estate Ordinance an administrator may sell only for any of the purposes therein stated; even then his power of sale is subject to the proviso therein contained. In my view the discretionary power of sale under section 20 of the said Ordinance can only be exercised for the purposes stated in the said section.

In *Lee Ah Thaw & Anor.* v. *Lee Chun Tek*[2] it was held that where the administration of the estate of a deceased was incomplete and hence the residue of the estate was unascertained, a residuary beneficiary did not have a caveatable interest in the lands forming part of the estate of the deceased. In that case Lee Hun Hoe C.J. said at page 176 (2nd Col. 1):

> "A residuary legatee or devisee, however, has no claim to any of the deceased's estate in specie or to any part of that estate until the residue is ascertained. His right is to have the estate administered properly and then claim for the benefit."

And at page 177 (1st Col. E), he said:

> "In *Barnardo's case* (1921) 2 AC1 Lord Atkinson made these observations at page 11 which seem to cover the situation in the present case:–
>
> > "The case of *Lord Sudeley* v. *Attorney-General* decided in this House conclusively established that until the claims against the testator's estate for debts, legacies, testamentary expenses, etc. have been satisfied, the residue does not come into actual existence. It is a non-existing thing until that event has occurred. The probability that there will be a residue is not enough. It must be actually ascertained."
>
> So that appellants as residuary beneficiaries cannot possibly claim to have interest until the residue is ascertained. Whether there will be any residue must await the completion of the administration."

The cases of *Tan Thean Choo* v. *Cheah Kah Seong*[3] and *Eng Mee Yong & Ors.* v. *Letchumanan (supra)* cited by Counsel for the Applicant are, in my view, distinguishable in that there the relationship of the parties in each case was that of vendor-and-purchaser, and that the question of whether the residuary estate of a deceased person has been ascertained so that a caveator has a caveatable interest does not arise.

To my mind, the first matter to be considered in the instant case is whether the applicant/caveator as a beneficiary of the deceased's estate has a caveatable interest, it being not disputed that he is a beneficiary and is entitled to the residue of the estate. On the authority of *Lee Ah Thaw & Anor.* v. *Lee Chun Teck (supra)* the answer to this question depends on whether, having regard to the present state of affairs, it can be said that the residue of the deceased's estate has already

been ascertained. Now, no evidence has been adduced nor had it been indicated on behalf of the respondents at the hearing that the deceased's estate has any outstanding debts or liabilities. In the circumstances I assume that there is none or, even if there is, the amount is quite negligible. In this respect, the facts in *Lee Ah Thaw & Anor.* v. *Lee Chun Teck, supra,* and *Re Savage's Caveat*[4] cited by counsel for the respondents are different in that in both these cases the estates appeared rather heavily indebted. In fact in *Re Savage's,* the estate was insolvent.

I do not think there can be any doubt that in the instant case the sons of the deceased (inte-estate) are entitled to share in the latter's estate. As to the entitlement of the unmarried daughters of the deceased, there is no evidence before me nor any authorities cited to support that such daughters are entitled to life interests (whatever that may mean) in the deceased's estate. Indeed counsel for the respondents merely raised several issues one of which being that whether the unmarried daughters would be entitled to life interests in the estate. On the other hand, authorities tend to show that unmarried daughters are only entitled to be maintained by their brothers who inherit their father's estate. In *Phiong Khon* v. *Chonh Chai Fah*[5] Lee Hun Hoe J. (as he then was) said (page 117):

'The underlying principle of Chinese customary law of intestate succession would seem to be that on the death of the parent the persons entitled to the family property are all the sons and the male descendants, regardless of whether they are sons of the primary or secondary wives. Where the deceased left a widow and daughters then those sons who share the property would be responsible for the support of their mother until her death, and sisters until their marriage or earlier death. I find support in the case of *Tay Sok Ann* v. *Tay Sok Hiong & Anor.* [(1955) Scr 17, 20] where the validity of a will was contested. There Blagden J. observed:—

> "In my view, as this is a Chinese Estate, any proved or accepted Chinese custom in Sarawak should prevail over English law. This is apparent from the proviso to section 2 of the Application of Laws Ordinance (No. 27 of 1949). From the evidence available to the court I am satisfied that there is accepted Chinese custom in Sarawak relating to the descent of property on an Intestacy, and that custom is that the property of the deceased is divided equally between his sons, who become responsible for the support of their mother until her death and their sisters until their marriage or earlier death."

This has always been recognised as the Chinese customary law of intestacy in Sarawak.

I had occasion to assist in the preparation of the respondents' case in *Phiong Koh* v. *Chonh Chai Fah supra,* and I know as a fact that the parties therein are Hakka. *Obiter dictum* though the above last quoted passage may be, in the absence of authorities or credible evidence to the contrary and until that custom is ruled inapplicable to our instant case, I would be inclined to accept the above custom as applicable for the purpose of this application. On that basis the deceased's sons who share the property of the deceased are therefore assumed to be responsible for the maintenance of their unmarried sisters until their marriage or earlier death. It follows then ascertainment of the residue of the deceased's estate is not affected by this issue.

I shall now consider the position of Law Ah Tsin and Law Ah Min whose father (Arthur Law) pre-deceased the deceased. It will be remembered that the applicant disputes their entitlement to share in the deceased's estate. But whether or not they are so entitled, this only affects the number of the residuary beneficiaries and does not in any way affect the ascertainment or the size of the residuary estate for distribution. To put it in another way, on the evidence, since the residue of the estate has been ascertained (their being no evidence of any outstanding debt or liability of the estate), the number of the residuary beneficiaries only affects the value of their individual shares but does not affect the size or ascertainment of the residue of the estate. I therefore hold that the residue of the deceased estate has been ascertained, and the applicant has a caveatable interest.

For the above reasons, the motion is granted. There shall be an order that unless otherwise ordered by this court, the caveat registered as Instrument No. L11565/1979 at the Kuching Land Registry Office on November 13, 1979 affecting the 3 parcels of land described in this motion do remain in force until the determination by court of the various questions affecting the winding up of the deceased's estate under section 29 of the Administration of Estates Ordinance.

Costs of this motion to the applicant to be taxed. Such taxed costs to be paid by the Estate.

Motion granted.

Solicitors: *Reddi & Co.; Yong & Co.*